

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAWN MARIE BRUMBAUGH

Claimant

VS.

ATRIA HEARTHSTONE

Respondent

AND

OLD REPUBLIC INSURANCE CO.

Insurance Carrier

Docket No. **261,507**

ORDER

Respondent and its insurance carrier request review of the May 30, 2007 Post Award Medical Order by Administrative Law Judge Brad E. Avery. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Frederick J. Patton II of Topeka, Kansas, appeared for the claimant. Richard W. Morefield Jr. of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record contained within the file, including the transcript from the post-award hearing held on April 24, 2007, the transcript of the March 6, 2007, deposition of Dr. Michael L. Smith and the transcript of the May 7, 2007, deposition of Dr. David J. Clymer.

ISSUES

The claimant suffered an accidental injury on November 10, 2000, while working for the respondent. The Administrative Law Judge (ALJ) awarded claimant compensation for a 46.25 percent work disability on December 4, 2002. Upon review the Board modified the

ALJ's Award to a 42.25 percent work disability on October 31, 2003. Upon appeal, the Court of Appeals affirmed the Board's Order on September 3, 2004.

Claimant filed an application for post award medical on July 13, 2006, seeking authorization for the recommended fusion surgery on her back. At the post award hearing, respondent denied claimant's current need for medical treatment was related to the underlying work-related accident.

The ALJ ordered respondent to provide claimant additional medical treatment with Dr. Michael Smith. The ALJ further noted: "Respondent has the duty to provide medical care to relieve the symptoms in claimant's back. While there is no guarantee of success, both doctors testifying agreed the procedure was reasonable." Finally, the ALJ sustained claimant's objection to respondent's exhibits 3 and 4 offered at Dr. David J. Clymer's deposition.

The respondent requests review and argues the ALJ erred by sustaining objections to the introduction of evidence that supported respondent's contention claimant had suffered an intervening injury. Respondent further argues claimant failed to meet her burden of proof that her current condition is caused by the injury she suffered in the underlying award and that the ALJ applied an incorrect legal standard in ordering the doctor to proceed with the requested surgery.

The claimant argues the ALJ's Post Award Medical Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Initially, the respondent argues the ALJ erred in sustaining the objection to exhibits 3 and 4 at Dr. Clymer's deposition. The respondent offered the exhibits so the doctor could determine whether the claimant's allegations of physical abuse contained in the documents supported respondent's theory claimant had suffered an intervening accident. And to attack claimant's credibility regarding her testimony that she had not been in any fights or suffered additional injury. The ALJ determined the exhibits were irrelevant. The Board disagrees with the ALJ's evidentiary ruling and overrules the objection. As the Board conducts a de novo review it is not necessary to remand this case to the ALJ for consideration of the exhibits as the Board will consider the exhibits part of the evidentiary record.

On November 10, 2000, while assisting a resident to the bathroom, claimant suffered an injury to her low back when the resident started to fall and claimant tried to

catch her. Ultimately, on September 17, 2001, Dr. Michael L. Smith performed a surgical laminectomy and diskectomy at L5-S1 on claimant's back.

In March 2002 claimant began working as a customer service manager at Wal-Mart. Claimant noted the job did not require her to do any lifting. Claimant left that job and worked as a cashier at a service station until February 2006 when her back pain worsened to the point she could no longer stand for eight hours.

From February 2002 to approximately July 2005 claimant did not seek medical treatment for her back. But claimant testified that after the surgery in 2001 her back pain never went away and has gradually gotten worse with a loss of feeling in her foot. And claimant testified that she never suffered injury while working at Wal-Mart or the service station nor any other accidental injury. But she agreed that her back pain causes her trouble lifting her 24-pound two-year-old child. And that she had a 20-pound lifting restriction after her surgery.

On cross-examination claimant was asked whether she had filed a Petition for a Protective Order against her husband. An objection to the question was sustained. During later questioning claimant denied that her husband injured her in March 2004. Claimant was again asked if she had filed a Petition for a Protective Order against her husband. The ALJ again sustained an objection to the question. The following colloquy occurred:

Q. Did you file a protection from abuse petition with the Court?

MR. PATTON: Objection, not relevant, your Honor.

JUDGE AVERY: Sustained.

MR. MOREFIELD: Judge, I think if she was injured by somebody - -

JUDGE AVERY: She already answered your question was she injured and her answer was no. Whether she filed a protection of abused petition really has nothing to do with whether she was - -

MR. MOREFIELD: It would seem to be inconsistent with the answer.

JUDGE AVERY: Not necessarily.¹

Finally, claimant denied that she had been in any fights since the time of the initial Award in this case. During Dr. Clymer's deposition the respondent offered, over objection, the two Petitions for Protective Order that claimant had filed on March 4, 2004, and June 10, 2005, against her husband. The first petition alleged that claimant had been hit in the mouth

¹ P.A.H. Trans. at 11-12.

cutting her lip. The second alleged that on May 16, 2005, claimant had been lifted off the ground by her face, dropped and then slapped across her face.

Claimant gave birth to her fifth child on June 13, 2005. Claimant returned to Dr. Smith in August 2005 and related she had an increase in back pain in July 2005 when she got up from a chair at home and started to take a step. Dr. Smith provided claimant with physical therapy, epidural injections and pain medication. Finally, the doctor recommended surgical decompression and fusion at L5-S1. Dr. Smith opined that claimant's current complaints are the direct and natural result of her original injury.

Dr. Smith noted that his lifting restrictions of 20 pounds occasionally and 10 pounds frequently are more to prevent discomfort as opposed to preventing additional damage. And frequent lifting 30 pounds would irritate her back causing increased symptoms but not necessarily damage.

On cross-examination Dr. Smith was questioned whether despite the fact that claimant was in an automobile accident in 2001 a few months after her surgery, the fact that she had increased pain getting up from a chair and the fact she regularly lifted a 24 pound child it was his opinion the reason claimant needs surgery is because of her accident in 2000. Dr. Smith testified:

Q. Now, in light of those facts, is it your opinion that the predominate reason Ms. Brumbaugh needs or is a candidate for a lumbar fusion at this point is because of her accident in the year 2000?

A. It would seem that it all started around 2000, as best as I can tell. So in that regard, I think that since that accident 2000 she has struggled. Now, over the years, like everybody else, they have ups and downs and it's part of life. You have kids, you have to work, you may or may not be in auto accidents, and so as life has gone on she has continued to struggle. But it all seems that everything began in 2001 at work. And this all seems to be isolated to the L5-S1 disk space. It seems to be persistent to the right leg. So her symptoms really haven't changed over the years. They've gradually worsened over the years. I think she got some improvement with the discectomy back in '01.

Q. Well, doctor, you would agree, wouldn't you, that the medical records indicate that she had improvement, and then following the automobile accident she reported increased back pain?

A. Well, I think that after surgery – it's never a straight line improvement. Not never. But a lot of times it waxes and wanes for awhile and then you kind of reach a plateau where things seem good. But even during that time most people will report that today is a little better than yesterday or today is worse than yesterday.

So I don't know that you can look at the auto accident and say, oh, there she reinjured her back and it's created all this damage from the auto accident.²

The doctor further noted that claimant's complaints remained consistent and the gap in her treatment from 2002 until 2005 did not mean claimant had no discomfort, was doing well and then reinjured herself. And the doctor concluded claimant did not suffer any severe intervening damaging event. Finally, Dr. Smith further testified claimant has a 50 percent chance that the surgery will help. The doctor opined that if claimant was able to manage her life with the discomfort and avoid the back surgery that would be the ideal situation.

At respondent's attorney's request, Dr. David J. Clymer reviewed medical records as well as examined and evaluated claimant on December 4, 2006. Dr. Clymer testified claimant would be best treated nonsurgically rather than with a back fusion due to her greater subjective complaints versus objective clinical findings and the fact that her symptoms might not be relieved by surgery. Dr. Clymer noted that the automobile accident in 2001 could have aggravated claimant's condition but that he could not offer anything more definitive without looking at the contemporaneous medical records. When questioned about the lack of medical treatment from 2002 through 2005 the doctor noted it was common to have ongoing symptoms following lumbar surgery. And that those symptoms wax and wane and may worsen as a result of aging and activities. When questioned about the alleged events listed in the first petition for protective order the doctor noted there was no reference to the back but that physical abuse can aggravate the low back process. When questioned about the alleged events listed in the second petition for protective order, the doctor noted such activity could have an impact on back pain. The doctor concluded that claimant's delivery of a child as well as the alleged abuse in 2005 most likely had some impact on the progression or aggravation of claimant's back complaints. In summation, the doctor agreed the claimant's pregnancies, the alleged physical abuse, and repetitive bending or lifting caring for children could certainly cause some symptomatic aggravation. Dr. Clymer recommended claimant continue to work on general back/abdominal strengthening and manage symptoms in a nonsurgical fashion. The doctor anticipated that the back would be more stable with less symptoms versus a surgical fusion. Both Drs. Smith and Clymer opined that claimant had a 50/50 chance that her symptoms would improve.

Workers who are injured in accidents arising out of and in the course of their employment are entitled to receive benefits under the Kansas Workers Compensation Act, including such medical treatment that may be reasonably necessary to cure and relieve the workers from the effects of their injuries. K.S.A. 44-510h(a) provides:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines,

² Smith Depo. (Mar. 6, 2007) at 19-20.

medical and surgical supplies, ambulance, crutches, apparatus and transportation . . . **as may be reasonably necessary to cure and relieve the employee from the effects of the injury.** (Emphasis Added)

And the injured workers' rights to receive medical benefits continue after an award for compensation has been entered. The post-award medical statute, K.S.A. 44-510k, provides, in pertinent part:

(a) At any time after the entry of an award for compensation, the employee may make application for a hearing . . . for the furnishing of medical treatment. . . . **The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.** (Emphasis Added)

The claimant testified that after her surgery in 2001 her back pain never completely resolved and gradually worsened. She denied she suffered any intervening accidents or injuries to her back. Dr. Smith attributed claimant's current condition to her accidental injury in 2000 which was the subject of the underlying award. Although Dr. Clymer noted that certain intervening events could have increased claimant's symptomatology he did not state any of those events were the cause of claimant's current condition. The Board finds claimant has met her burden of proof that her current condition and need for additional medical treatment is the result of her injury suffered in 2000.

Respondent next argues the ALJ applied an incorrect standard to determine claimant needed the recommended surgery. Simply stated the ALJ specifically stated the recommended treatment was reasonable and respondent had the duty to provide medical care to relieve claimant's back symptoms. The ALJ recognized that no surgery is guaranteed success but that such recommended treatment was reasonable under the facts and circumstances of this case. The ALJ correctly applied the statutory requirement that medical treatment be reasonably necessary to relieve the employee from the effects of the injury.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated May 30, 2007, is modified to overrule the objection to exhibits 3 and 4 of Dr. Clymer's deposition and affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of August 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frederick J. Patton, Attorney for Claimant
Richard W. Morehead Jr., Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge